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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ANTONIO WASHINGTON, et al.,

Defendants and Appellants.

D053006

(Super. Ct. No. SCD202281)

APPEAL from judgment of the Superior Court of San Diego County, John S. Einhorn, Judge. Affirmed as to Washington and Watkins, reversed in part as to Smith.

In connection with a home invasion robbery, a jury convicted Antonio Washington, Donald Duante Smith and Willie Louis Watkins of two counts of rape in concert (Pen. Code,<sup>1</sup> § 264.1), four counts of forcible rape (§ 261, subd. (a)(2)), two counts of forcible oral copulation in concert (§ 288a, subd. (d)), six counts of forcible oral copulation (§ 288a, subd. (c)(2)), one count of sodomy in concert (§ 286, subd. (d)), one

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<sup>1</sup> Statutory references are to the Penal Code unless otherwise specified.

count of rape with a foreign object (§ 289, subd. (a)(1)), two counts of attempted rape (§§ 664/261, subd. (a)(2)), four counts of first degree robbery (§§ 211, 212.5, subd. (a)), and two counts of false imprisonment by violence, menace or deceit (§§ 236, 237, subd. (a)). Washington and Smith also were found guilty of two counts of kidnapping for robbery (§ 209, subd. (b)(1)). With respect to all three defendants and all of the consummated forcible sex crimes, the jury also found true several enhancement allegations under section 667.61, also known as the "One Strike" law; these allegations concerned the commission of the sex crimes during a first degree burglary, against multiple victims, and with the personal use of a deadly weapon. (§ 667.61, subds. (d)(4), (e)(4), (e)(5).)

The trial court sentenced Washington and Smith to 300 years to life for the sex crimes under the "One Strike" law, two consecutive life with the possibility of parole terms for the kidnapping counts, and a determinate term of 16 years and four months in prison. The court sentenced Watkins to 300 years to life with the possibility of parole for the sex crimes under the "One Strike" law and a determinate term of 16 years and four months.<sup>2</sup>

Washington appeals, contending the trial court erred by (1) admitting his pretrial statements to police, (2) admitting prior bad acts evidence; (3) instructing the jury that

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<sup>2</sup> The trial court ordered the sentencing minute order for all three defendants to be amended nunc pro tunc to reflect a corrected aggregate determinate term of 15 years and four months.

flight demonstrated a consciousness of guilt; and (4) imposing a sentence that constituted cruel and/or unusual punishment.

Smith appeals, contending the trial court erred by admitting bad acts evidence and there was insufficient evidence to support his conviction on one of the forcible rape counts.

Watkins appeals, contending the prosecutor committed prosecutorial misconduct and it was error to give a flight instruction.<sup>3</sup>

## FACTS

### *Uncharged Boardwalk Robberies*

On the night of October 14, 2006, Washington and Smith and two minors—Diego R. and Armando S.—smoked marijuana at Sunset Cliffs in Point Loma. About 11:00 p.m., the four returned to Washington's residence in southeast San Diego, where they met Watkins, Jeffrey Clark Turner, Darryl Shegog and three other males. Shortly thereafter, these 10 individuals decided to go to Mission Beach to obtain and smoke marijuana. Diego R. drove Armando, Washington and Smith in his red Corolla. Watkins, Turner and Shegog drove in a green car, and the others drove in a black car. The three cars were parked near some bathrooms in the parking lot immediately south of Belmont Park. The occupants walked northbound past the parking lot immediately north of the rollercoaster and onto Strand Way as they awaited the delivery of the marijuana.

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<sup>3</sup> All three defendants join the issues raised by their codefendants that accrue to their benefit. (Cal. Rules of Court, rule 8.200, subd. (a)(5).)

About 2:15 a.m. on October 15, three college students—Ryan Fleming and brothers Hugo and Phillip Catalan—were walking southbound on Strand Way when they encountered the group of 10 individuals, who surrounded them. Washington and Smith pulled out black BB guns, and Washington demanded money—telling the three college students to give them everything they had. Washington and Smith searched the students' pockets. Watkins and three others stood nearby while Diego, Armando and two others stayed in the background. After Fleming and Phillip Catalan gave the robbers their money, both groups walked away.

Fleming called police on his cell phone at 2:26 a.m., and they proceeded to Hugo Catalan's residence, a few blocks south of Belmont Park.

Meanwhile, the group of 10 split into three smaller groups. One of these groups left the area in the black car. Diego, Armando, Turner and Shegog stopped and sat down on some benches near Diego's car in the parking lot south of the rollercoaster.

Washington, Smith and Watkins continued walking south along the Boardwalk toward San Fernando Place.

At 2:38 a.m., police officers investigating the robberies reported by Fleming detained Armando, Diego, Turner and Shegog, who were still sitting on benches in the south parking lot. While two officers conducted field interviews, another officer brought Fleming and the Catalan brothers to the location for curbside lineups. Fleming and the Catalan brothers were unable to identify Armando, Diego, Turner and Shegog as being involved in the robberies. The field interviews concluded at 3:16 a.m.

### *Home Invasion Crimes*

After attending a party in north Mission Beach, John "Jack" S. and Adam V. returned to Jack's residence, a two-story condominium immediately south of Belmont Park, early in the morning of October 15. At around 2:00 a.m., Catherine C. and Elizabeth N. arrived at Jack's residence. All four attended the University of San Diego. Initially, they watched a movie on a big-screen television in the living room. After about 10 to 20 minutes, Catherine and Adam went upstairs while Jack and Elizabeth stayed downstairs.

Shortly after 2:30 a.m., two Black men wearing yellow bandanas to mask their faces entered the condominium through the unlocked front door. Both had guns. The first intruder wore baggy clothing, a hooded yellow sweatshirt and motorcycle gloves.<sup>4</sup> The second intruder was shorter and more broadly built, and was wearing a sweatshirt without a hood. The second intruder ordered Jack and Elizabeth to go to the kitchen, lie face down, close their eyes and not look at them or move. Both men demanded money. Jack gave them his wallet, and Elizabeth said she had nothing but her cell phone. When

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<sup>4</sup> Diego, who testified on behalf of the prosecution, said that he thought Washington was wearing a black jacket with yellow sleeves.

they saw Catherine's purse, the intruders accused Elizabeth of lying. After Elizabeth said she was telling the truth, the intruders realized that there were people upstairs.<sup>5</sup>

One of the intruders went upstairs and found Catherine and Adam in a bedroom on the bed "making out" in their underwear. This intruder, described by Adam as 5' 10" or 5' 11" tall and skinny, wore a dark colored hooded sweatshirt and was carrying a small black gun. The intruder ordered Catherine and Adam to lie on their stomachs on the floor and not look at him; he also demanded Adam's wallet and cell phone. After Adam handed over his wallet, the intruder escorted him to another bedroom; Adam became aware of a second man in the hallway, who had "a wider body" than the first man.

The man carrying the gun ordered Catherine to orally copulate the second man and then orally copulate him. One of the men ordered Catherine to remove her underwear and lie down on the bed, facing the wall. One of the men then raped her. Afterward, the two men escorted Catherine to the other bedroom, where there was a third Black male, who was dressed in baggy clothes and a hooded sweatshirt.

Subsequently, one of the men brought Elizabeth upstairs into the second bedroom, where Catherine was sitting on the bed, naked and crying. Elizabeth described this man

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<sup>5</sup> For a number of reasons, none of the home invasion victims was able to identify any of the defendants: the first two intruders wore masks; poor lighting upstairs; and victim compliance with orders to close their eyes and not look at the intruders. The prosecution theorized that Washington and Watkins entered the condominium first and Smith entered later based on the victims' sketchy descriptions of body builds and the statements of Washington and Smith. The jury, of course, could view defendants at trial. We note that according to the probation reports, Washington, 19, is 5' 10" tall and weighed 145 pounds; Smith, 20, is 5' 7" tall and weighed 145 pounds; and Watkins, 32, is 5'10" tall and weighed 210 pounds.

as a bigger, older person who gave orders to the other men. He held a gun to Elizabeth's back and ordered her to take off her clothes. This man put his fingers into Elizabeth's vagina, while one of the other two men raped Catherine.

The man described as bigger and older ordered Adam, who had been in a corner of the room, to take off his underwear and have sexual intercourse with Elizabeth. Adam was unable to produce an erection but pretended to comply. The thinner man complained that Adam was faking, and one of the men ordered Elizabeth to orally copulate Adam. After Elizabeth complied, Adam was told to have sexual intercourse with her. Again, Adam could not produce an erection but pretended to have intercourse with Elizabeth. Again, the men recognized the pretense and pushed Adam to the floor. Subsequently, Adam was placed in the upstairs bathroom.

The bigger and older man asked Elizabeth if she "like[d] Black guys" and ordered her to orally copulate him. Elizabeth complied and he then raped her. One of the other two men ordered Elizabeth to stand up and bend over; he then attempted to rape her while standing behind her, but was unable to penetrate her vaginally from behind. The man ordered Elizabeth to lie on her back on the bed, and he raped her from a standing position. Next, he told her to orally copulate him. After putting a gun to Elizabeth's head, he warned her not to bite him. The third man sodomized Catherine and then raped her. The bigger and older man kissed Elizabeth on the vagina.

Downstairs, Jack, still lying on the kitchen floor, felt what he thought was a gun to his head. The armed man demanded money. Jack believed the individual was not one of the two original people to enter the condominium because of the tone of his voice and the

fact he already had given his wallet to the first two intruders. Jack heard the sounds of plastic bags rustling and then footsteps coming downstairs. The widely built intruder told Jack to get up and disconnect the television cables. After this was accomplished, this man escorted Jack upstairs to the bathroom and left Jack with Adam, who was naked and shaking and shivering in the dark.

One of the intruders with a gun told Catherine and Elizabeth to put on some clothes and walk downstairs. The women put on some of Jack's clothes that were on the floor and went downstairs. Elizabeth noticed the television was gone. One of the men dumped out Catherine's purse and took \$100, two ATM cards, a cell phone and a camera. Hoping to persuade the men to leave, Catherine wrote down the PIN number for her debit cards. The two thinner men told the women to go upstairs and put on their own clothing. When Catherine and Elizabeth returned downstairs, the two thinner men were waiting with plastic grocery bags filled with items from the condominium. The men started to walk to the front door and directed the women to go with them. The four had proceeded to about the midway point between the condominium and parking lot when one of the men said "5-0 in the park," and threw Catherine's car keys at her. The two men then ran away, and Catherine and Elizabeth ran back to the condominium, where they found Jack and Adam in the upstairs bathroom. Adam quickly dressed and the four went to a nearby neighbor's apartment to call the police. Police records show the 911 call was logged at 3:15 a.m.

### *Post-Home Invasion Activities of Intruders*

Watkins, who was the older man with the wider build, had left the condominium earlier with the television and walked toward the lot where the cars were parked. About 3:00 a.m., Watkins, without the television, approached the police officers who were interviewing Armando, Diego, Turner and Shegog about the Boardwalk robberies of the three college students. Watkins expressed concern about the four detainees and identified himself as Turner's uncle. After the Boardwalk robbery victims were unable to identify any of the four detainees, the officers released them to Watkins, who indicated he would give the minor detainees a ride home. By this time, it was 3:16 a.m.

After the police left, Watkins signaled to Washington and Smith, who had stopped at the southern end of the parking lot when they saw police. Watkins retrieved the television he had hidden in the sand when he first saw the police and placed it in the green car. Washington and Smith ran to Diego's car; they were carrying plastic grocery bags containing an Xbox 360, video games, DVD's and two cell phones. As Diego drove south on Interstate 5, Armando used one of the cell phones to call his brother Robert. Smith said: "[W]e just came up on some shit." Smith and Washington said they had "fucked some girls."

Diego then drove to Washington's residence in southeast San Diego; Watkins was already there. At 3:39 a.m., Diego, Armando and Smith stopped at a convenience store where Smith attempted to get cash using one of Catherine's stolen ATM cards; Smith's arrival and departure were recorded on the store's surveillance video camera. Diego then drove Armando and Smith to National City, where Armando's girlfriend lived, and they

unloaded the stolen items from Diego's car. Diego returned to southeast San Diego, where he picked up Washington, Watkins and Turner and brought them back to the National City residence of Armando's girlfriend. Washington, Smith, Watkins, Turner, Armando and Diego spent the rest of the night there.

The next day, Smith, Armando and Diego unsuccessfully tried to find a cable for the Xbox 360 at two electronics stores and were unable to pawn the Xbox 360. However, they pawned the stolen video games. That evening, the group met at Washington's residence, where Watkins said "somebody was running their mouth"; Watkins warned everyone not to talk about the home invasion. Nonetheless, Watkins remarked he had "made that bitch kiss [my] dick" and had put Adam and Jack in the bathroom.

#### *Police Investigation*

Police took Catherine and Elizabeth for sexual assault examinations, and the results were consistent with the women's accounts of the assaults. Meanwhile, officers had contacted the cell phone carriers for the stolen cell phones and learned two cell phones were active and using cell sites on southbound Interstate 5. At 4:09 a.m., there was an incoming call to Adam's phone from Catherine's phone that lasted for 13 seconds. One of the phones also reflected a call traced to Armando's brother.

On October 17, police contacted Armando at his residence about the call he made to his brother with the stolen cell phone. Armando initially lied about how he obtained the cell phone, but eventually agreed to tell the truth and testify in exchange for being allowed to enter juvenile court admissions to receipt of stolen property and being an accessory after the fact. Also on October 17, police contacted Diego at work. Diego

initially lied about the events, but later signed a cooperation agreement with the District Attorney's office, in which he agreed to testify truthfully; the agreement was the same as Armando's.<sup>6</sup>

On October 18, police served a search warrant at a residence associated with Smith and recovered his navy blue sweatshirt from a trash dumpster. Two days later, police recovered a diaper box containing stolen video games, an Xbox 360, an iPod, Catherine's cell phone and DVD's from a house associated with Washington. His fingerprints were on the cell phone and one of the DVD's.

Police also recovered several stolen video games that had been pawned. Washington's fingerprints were on one of the games.

Smith turned himself in to police shortly after midnight on October 20. Smith told police that Elizabeth and Jack were already lying face down on the floor when he entered the condominium. Smith asked them if they had "any phones or anything." When Smith went upstairs, "the girl" and "the guy" were both already naked. Smith admitted having intercourse and oral sex with both Elizabeth and Catherine, but denied committing sodomy or digitally penetrating either woman.

After an arrest warrant was issued, Washington turned himself in to law enforcement authorities in Arizona on October 20. When interviewed by police, Washington admitted participating in the Boardwalk robberies, having intercourse and

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<sup>6</sup> Armando and Diego, both of whom originally faced seven counts of robbery and the possibility of being tried as adults, were declared wards of the juvenile court. They respectively had served six and five months in juvenile hall and were anticipating being placed on probation following their trial testimony.

oral sex with Catherine and trying to have vaginal sex with Elizabeth, but denied forcing Elizabeth to orally copulate him. Washington said when he first went upstairs, he found the "guy" in his boxers and the girl wearing a bra and panties.

Police arrested Watkins as he left his apartment on October 20. Watkins denied involvement in any of the sexual assaults, but admitted taking the big screen television from the condominium.

#### *DNA Evidence*

During Catherine's and Elizabeth's sexual assault examination, vaginal swabs, perianal swabs, and swabs of the external genitals were taken. Sperm and a blood stain were found on the crotch of Catherine's underwear. One sperm cell and blood were found on Elizabeth's underwear.

DNA testing revealed that Washington was a possible contributor to the mixture of male DNA from Elizabeth's vaginal swab and could not be excluded as a contributor to Elizabeth's external genital swab. Washington could not be excluded as a contributor to the male DNA mixture from Catherine's external and internal genital swabs.

DNA testing revealed that Smith could not be excluded as a major contributor to Catherine's vaginal swabs. Also, the sweatshirt recovered from the trash dumpster had a stain near the bottom that was positive for semen. Smith and Catherine were major contributors to the DNA mixture from the seminal fluid stain on the sweatshirt.

DNA testing revealed that Watkins was a contributor to the DNA mixture from Elizabeth's vaginal and external genital swabs. Watkins also could not be excluded as a contributor to the sperm fraction from Catherine's internal genital swab.

## DISCUSSION

### *I. Washington's Appeal*

#### *A. Admission of Pretrial Statements to Police*

Washington contends the trial court erroneously admitted his pretrial statements, which he claims were not voluntarily made because of coercive police tactics as well as his lack of sophistication and young age. The contention is without merit.

#### *Background*

Sometime after the home invasion, Washington went to Arizona. Police recovered some of the items taken during the home invasion at the residence of Washington's sister, Tiffany Jimerson, who told investigators that her brother had given her the stolen property. Police arrested Jimerson, who had a baby she was breastfeeding. Jimerson's husband contacted Washington in Arizona and told him that his sister had been arrested and would not be released until Washington surrendered to authorities. Washington turned himself in to police in Arizona on October 20. The next day, San Diego police detectives traveled to Arizona, where they interviewed Washington.

At a hearing on Washington's motion to suppress his postarrest statements, Washington testified he was in foster care from the time he was eight years old until his eighteenth birthday, when he started living with his sister and her family. Washington dropped out of school in the eleventh grade and had a diagnosis of attention deficit hyperactivity disorder. Washington had two limited contacts with police on prior occasions and did not remember being advised of his *Miranda* rights during either contact.

Washington testified that after he turned himself in, he was placed in a jail cell with 20 other men and was unable to sleep. After the San Diego police detectives traveled to Arizona, a male detective asked if he wanted to say anything before they started the interview. Washington asked how his sister was and whether the police were going to release her. The response, Washington testified, was: "'After you finish talking with us, we're going to call down there [San Diego] and get her released.'" At that point, Washington believed he had "to tell them what they wanted to hear. [I] [h]ad to give a statement [¶] . . . [¶] [f]or my sister to go home." Washington waived his *Miranda* rights, but testified he lied when he said he understood his rights.

Detective Diana Webb testified that she and Detective Bob Gassman interviewed Washington in Arizona. According to Webb, Washington did not appear sleep deprived and appeared to understand the questions and answer them in an articulate manner. Webb did not remember any conversation with Washington about his sister. Webb said there were no promises or threats made to Washington. Webb was certain that she and Gassman did not tell Washington that if he provided a statement his sister would be released from custody; in fact, the sister had been released the day before the interview.

The trial court denied Washington's motion to suppress his pretrial statements. The court said it had listened to the audiotape of the Arizona interview and watched videotapes of the subsequent police interviews in San Diego. The court found Washington had been properly advised of his *Miranda* rights and had made a knowing, intelligent and voluntary waiver. The court further found that any discussions about Washington's sister did not constitute police misconduct and were not express or implied

threats or promises. The court also noted that Washington was not a good historian and his testimony differed from his statements on the videotapes.

### *Legal Principles*

Admission of an involuntary confession is barred by the federal and California Constitutions. (*People v. Massie* (1998) 19 Cal.4th 550, 576; U.S. Const., 14th Amend.; Cal. Const., art. I, § 15.) The burden is on the prosecution to establish by a preponderance of the evidence that a defendant's confession was voluntary. (*People v. Massie, supra*, at p. 576.)

A statement is involuntary if it is "not 'the product of a rational intellect and a free will.'" (*Mincey v. Arizona* (1978) 437 U.S. 385, 398.) "The due process [voluntariness] test takes into consideration 'the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation.'" (*Dickerson v. United States* (2000) 530 U.S. 428, 434; see also *People v. Williams* (1997) 16 Cal.4th 635, 660; *People v. Leonard* (2007) 40 Cal.4th 1370, 1402 ["'Voluntariness does not turn on any one fact, no matter how apparently significant, but rather on the 'totality of [the] circumstances' . . ."].) An accused's "'mental level and intelligence'" should be considered when assessing the voluntariness of incriminating statements. (*People v. McWhorter* (2009) 47 Cal.4th 318, 358.)

Our review of the trial court's ruling is de novo. "We review independently a trial court's determinations as to whether coercive police activity was present and whether the statement was voluntary. [Citation.] We review the trial court's findings as to the circumstances surrounding the confession, including the characteristics of the accused

and the details of the interrogation, for substantial evidence. [Citation.] "[T]o the extent the facts conflict, we accept the version favorable to the People if supported by substantial evidence.'" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1093.)

A finding of involuntariness must be predicated on coercive police activity. (*Colorado v. Connelly* (1986) 479 U.S. 157, 169-170; *People v. Maury* (2003) 30 Cal.4th 342, 404.) Coercive police activity includes physical violence, verbal threats, direct or implied promises of leniency or other rewards, or any other improper influence. (*People v. Benson* (1990) 52 Cal.3d 754, 778.) However, coercive police activity ""does not itself compel a finding that a resulting confession is involuntary." [Citation.] The statement and the inducement must be causally linked.'" (*People v. Guerra, supra*, 37 Cal.4th at p. 1093.) The essential issue is whether the coercive activity proximately caused the defendant's free will to be overborne. (*People v. Jones* (1998) 17 Cal.4th 279, 296.)

### *Analysis*

Here, there is no claim, and the record contains no hint, of physical intimidation. Therefore, we are concerned only with a claim of psychological coercion—namely, the purported promise to arrange the release of Washington's sister after he talked to the detectives. It is undisputed that Washington's brother-in-law told him that Jimerson would not be released from custody unless he turned himself in to law enforcement authorities. However, there is conflicting evidence whether Gassman told Washington that his sister would be released after he talked to them. Washington testified that in response to his question about his sister Gassman told him that after the police

interviewed him they "were going to call down there and get [the sister] released."

Webb, however, testified that neither she nor Gassman talked to Washington about his sister's release. Thus, there was substantial evidence that police did not promise Washington that his sister would be released after he had been interviewed. On appeal, "'we accept the version favorable to the People if supported by substantial evidence.'" (*People v. Guerra, supra*, 37 Cal.4th at p. 1093.) Accordingly, Washington has not established for appellate purposes that the police used psychological coercion by promising to release his sister after the interview, or subterfuge by indicating that Jimerson remained in custody at the time of the interview.

Furthermore, even if Washington had established that when he inquired about his sister detective Gassman told him they would call to have her released after the interview, this conduct did not constitute a threat that his sister would not be released unless he talked to them or a promise that his sister would be released if he did talk to them. Washington's statement would not have been rendered legally involuntary if he in fact had been told that the detectives would make the call to have Jimerson released after he talked to them. "In evaluating a claim of psychological coercion, the 'question posed . . . is whether the influences brought to bear upon the accused were "such as to overbear [his or her] will to resist and bring about confessions not freely self-determined." ' " (*People v. Kelly* (1990) 51 Cal.3d 931, 952.) That did not happen here. Jimerson apparently was taken into custody because she received stolen property and acted as an accessory after the fact. There were reasonable grounds to arrest her and there is no suggestion that her arrest was improper. The record does not show the police

threatened to prosecute Jimerson if Washington did not speak with them. ""The fact, alone, that the principal motive for a confession is that it will probably result in the exoneration of another person who is suspected of complicity in the offense does not render the confession involuntary."" (*People v. McWhorter, supra*, 47 Cal.4th at pp. 355-356.) Our Supreme Court continued: ""If he felt himself under pressure to make a statement it came from the conditions he had created which placed [his sister] under suspicion. If he made the statement willingly it was, in a legal sense, voluntary."" (*Id.* at p. 356.)

Additionally, Washington had not shown the requisite causal link between detective Gassman's purported response to his inquiry and his incriminating statements— proximate causation. (*People v. Benson, supra*, 52 Cal.3d at p. 778.) "The requisite causal connection between promise and confession must be more than 'but for': causation-in-fact is insufficient." (*Ibid.*) An accused's statement is involuntary only if the threat or promise in fact induces him or her to make the incriminating statement. (*People v. Lucas* (1995) 12 Cal.4th 415, 442.) Although Washington testified he believed the detective's response was a promise which induced him to confess, the trial court clearly, albeit impliedly, found Washington's testimony lacking in credibility.

Moreover, a psychological ploy by police is prohibited only when, in light of all the circumstances, it is so coercive that it tends to result in a statement that is both involuntary and unreliable. (*Illinois v. Perkins* (1990) 496 U.S. 292, 297; *People v. Maury, supra*, 30 Cal.4th at p. 411.) "So long as a police officer's misrepresentations or omissions are not of a kind likely to produce a *false* confession, confessions prompted by

deception are admissible in evidence." (*People v. Chutan* (1999) 72 Cal.App.4th 1276, 1280.) "'The courts have prohibited only those psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable.'" (*People v. Jones, supra*, 17 Cal.4th at pp. 297-298.) The police conduct in this case was not reprehensible, and the record does not show that Washington felt great psychological stress.

Relying on *People v. Trout* (1960) 54 Cal.2d 576, overruled on another ground in *People v. Cahill* (1993) 5 Cal.4th 478, 510, footnote 17, Washington argues that police threats against third parties such as relatives are too coercive and result in involuntary confessions that are inadmissible. The reliance is misplaced. In *People v. Trout*, the police took the defendant and his wife into custody even though there were no grounds to hold her. (*People v. Trout, supra*, at pp. 579, 581.) The officers told them both repeatedly that she would be held until he confessed. (*Id.* at p. 580-581.) The police allowed her to see him in jail on two occasions in the hours following the arrest. (*Ibid.*) Each time the wife saw her husband, she tearfully relayed the police threats and promises. (*Id.* at p. 580.) One detective asked Trout what manner of man he was to allow his wife to go to jail when all he had to do was confess. (*Ibid.*) Another officer told Trout that his wife should be at home with their children at that time of the year, the holiday season. (*Ibid.*) After the second meeting with his wife, Trout confessed. (*Ibid.*) Police then allowed him to see a lawyer, who advised him that the police had no basis for charging his wife. (*Ibid.*) Trout then refused to sign a written version of his oral confession. Our Supreme Court held that the oral admission should not have been admitted in evidence.

(*Id.* at p. 585 ["We are satisfied that the confession resulted from improper pressure by the police and should not have been received in evidence"].)

This case is readily distinguishable. First, the police had grounds to take Jimerson into custody for receiving stolen property and being an accessory after the fact, whereas in *Trout* the police had no grounds to hold the wife. More importantly, the police in this case did not make implied threats to Washington whereas police did so in *Trout*. (See also *People v. Jackson* (1971) 19 Cal.App.3d 95, 99-100 [similarly distinguishing *People v. Trout*, *supra*, 54 Cal.2d 576]; *People v. McWhorter*, *supra*, 47 Cal.4th at pp. 352-356 [same].)

In *People v. Jackson*, *supra*, 19 Cal.App.3d 95, police arrested Jackson and his wife. After learning that his wife was a suspect, Jackson confessed, saying, "I'll just give you what information I can to get my wife out of this. You know, as soon as possible, because she's got a heart condition and I don't want to put her through any more than I already have.'" (*Id.* at p. 99.) In upholding the trial court's denial of the motion to suppress, the appellate court noted "there were no inducements nor, of course, were there any threats. At most there was a simple statement of fact by the officer that [the] defendant's wife would be released if further investigation convinced him and his superiors that she had no connection with the crime despite the suspicious circumstances which [the] defendant, by his own admissions, had created." (*Id.* at p. 100.)

Washington argues his young age, lack of sophistication, attention deficit hyperactivity disorder, limited education and minimal prior contacts with the criminal justice system increased his susceptibility to police coercion. We are not persuaded. A

court should consider such factors when evaluating the voluntariness of a confession. (*People v. Boyette* (2002) 29 Cal.4th 381, 412.) However, nothing in the record indicates the police took advantage of any of these factors during the interview or they played a significant role in this case.

### *B. Admission of Prior Bad Acts Evidence*

Washington and Smith contend the court prejudicially erred when it admitted evidence of the Boardwalk robberies of Fleming and the Catalan brothers to show their intent and identity with respect to the home invasion. We disagree that the evidence was improperly admitted on intent; however, we agree the evidence was inadmissible on the issue of identity.

#### *Legal Principles*

Evidence Code section 1101, subdivision (a), generally prohibits the use of character evidence to prove defendant's conduct on a specified occasion. However, Evidence Code section 1101, subdivision (b), provides for the admission of evidence of similar acts of misconduct or uncharged crimes when it is relevant to prove some fact, such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, other than the defendant's disposition to commit such an act. To be admissible, in addition to meeting one of these criteria, the probative value of the evidence must not be substantially outweighed by its prejudicial effect. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1123; Evid. Code, § 352.) We review the trial court's ruling for an abuse of discretion. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1118.)

Whether evidence of a prior act is admissible depends on three factors: (1) the materiality of the fact sought to be proved or disproved; (2) the tendency of the uncharged crime to prove or disprove the material fact; and (3) the existence of any rule or policy requiring the exclusion of relevant evidence. (*People v. Lindberg* (2008) 45 Cal.4th 1, 22.) Evidence of prior acts may be excluded under Evidence Code section 352 if its probative value is substantially outweighed by the probability that its admission would create substantial danger of undue prejudice, confusing the issues, or misleading the jury. (*Ibid.*)

The relevance of uncharged misconduct or crimes to show identity, intent, or the existence of a common design or plan is determined by the nature and degree of the similarity between such misconduct and the charged crime. "Evidence of uncharged crimes is admissible to prove identity, common design or plan, or intent only if the charged and uncharged crimes are sufficiently similar to support a rational inference of identity, common design or plan, or intent." (*People v. Kipp* (1998) 18 Cal.4th 349, 369.) "The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 402.) "A greater degree of similarity is required in order to prove the existence of a common design or plan." (*Ibid.*) "The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity." (*Id.* at p. 403.)

"The principal factor affecting the probative value of the evidence of defendant's uncharged offenses is the tendency of that evidence to demonstrate the existence of the fact for which it is being admitted . . . . Other factors affecting the probative value include the extent to which the source of the evidence is independent of the evidence of the charged offense, the amount of time between

the uncharged acts and the charged offense and whether the evidence is 'merely cumulative regarding an issue that was not reasonably subject to dispute.' [Citations.] The primary factors affecting the prejudicial effect of uncharged acts are whether the uncharged acts resulted in criminal convictions, thus minimizing the risk the jury would be motivated to punish the defendant for the uncharged offense, and whether the evidence of uncharged acts is stronger or more inflammatory than the evidence of the charged offenses." (*People v. Walker* (2006) 139 Cal.App.4th 782, 806.)

### *Analysis*

To be admissible to prove intent, the uncharged misconduct must be sufficiently similar to the charged offense to support the inference that the defendant probably harbored the same intent in each instance. (*People v. Lindberg, supra*, 45 Cal.4th at p. 23.)

"The least degree of similarity (between the uncharged act and the charged offense) is required in order to prove intent. [Citation.] '[T]he recurrence of a similar result . . . tends (increasingly with each instance) to negative accident or inadvertence or self-defense or good faith or other innocent mental state, and tends to establish (provisionally, at least, though not certainly) the presence of the normal, i.e., criminal, intent accompanying such an act. . . .'" (*People v. Ewoldt, supra*, 7 Cal.4th at p. 402, quoting 2 Wigmore, Evidence (Chadbourn rev. ed. 1979) § 302, p. 241.)

""The inference to be drawn is not that the actor is *disposed* to commit such acts; instead, the inference to be drawn is that, in light of the first event, the actor, at the time of the second event, must have had the intent attributed to him by the prosecution."" (*People v. Roldan* (2005) 35 Cal.4th 646, 706 .)

"Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear." (§ 211.) In addition to the robbery charges involved in the home invasion, Washington and Smith faced "One Strike" allegations that they committed various sex

offenses during the commission of a burglary, among other things. By pleading not guilty and denying all allegations, Washington and Smith placed all of the elements of the offenses and the "One Strike" allegations in dispute at trial. (*People v. Lindberg, supra*, 45 Cal.4th at p. 23.) The "One Strike" burglary allegation required proof that Washington and Smith intended to steal property before they entered Jack's condominium. The intent of Washington and Smith clearly was at issue.

The uncharged Boardwalk robberies were sufficiently similar to the home invasion robbery charges and the "One Strike" burglary allegations to permit a reasonable jury to infer Washington and Smith acted with the same intent to forcibly obtain property from the victims. In each instance, they acted jointly and targeted young college students. The same weapons were used in the Boardwalk robberies and the home invasion. Additionally, the Boardwalk robberies and the home invasion were committed in the same area, and the home invasion immediately followed the Boardwalk robberies.

The admission of the Boardwalk robberies to show intent also was proper under Evidence Code section 352. Under Evidence Code section 352, we consider whether the probative value of the evidence of defendant's uncharged misconduct is "'substantially outweighed by the probability that its admission [would] . . . create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.'" (*People v. Ewoldt, supra*, 7 Cal.4th at p. 404.) Aspects of the Boardwalk robberies and the home invasion robberies were similar enough to prove that Washington and Smith had the requisite intent to steal by force to establish the home invasion robberies and the "One Strike" burglary allegations. Also, the probative value of the evidence is increased by the fact

that the offenses occurred closely in time and proximity. (See *People v. Kipp, supra*, 18 Cal.4th at p. 371.)

We weigh against the probative value of this evidence the danger of undue prejudice, of confusing the issues, and of misleading the jury. With regard to undue prejudice, although evidence of the uncharged incident will often present the possibility that a jury might be inclined to view the evidence of a defendant's prior involvement in a crime as evidence of his criminal propensities, "prejudice of this sort is inherent whenever other crimes evidence is admitted [citation], and the risk of such prejudice was not unusually grave here." (*People v. Kipp, supra*, 18 Cal.4th at p. 372.) For purposes of applying Evidence Code section 352, the fact that evidence is harmful to a particular party does not establish prejudice. (See *People v. Zapien* (1993) 4 Cal.4th 929, 958.) Rather, evidence is unduly prejudicial only if it "'uniquely tends to evoke an emotional bias against . . . [one party]'" (*People v. Minifie* (1996) 13 Cal.4th 1055, 1070-1071) or causes the jury to prejudge the issues based on extraneous factors (*People v. Zapien, supra*, at p. 958). The evidence of the uncharged Boardwalk robberies was far less inflammatory than the evidence concerning the home invasion offenses, which included the multiple forcible sex offenses. We agree with the trial court's observation that the Boardwalk robberies were "certainly not . . . overly prejudicial against any of the defendants when compared with the charges in the instant case." We conclude the trial court did not abuse its discretion in admitting evidence of the Boardwalk robberies to show intent.

However, the evidence of commonality between the uncharged Boardwalk robberies and the home invasion robberies falls short of the "stringent 'identity' standards" for admissibility of the uncharged robberies to prove Washington's and Smith's identities as the home invasion perpetrators. (*People v. Robinson* (1995) 31 Cal.App.4th 494, 503.) To show identity, similarities by themselves are not enough; the similarities have to be "sufficiently unique or distinctive so as to demonstrate a 'signature' or other indication that defendant perpetrated both crimes." (*People v. Rivera* (1985) 41 Cal.3d 388, 393, disapproved on another ground in *People v. Lessie* (2010) 47 Cal.4th 1152, 1168, fn. 10.)

"The greatest degree of similarity is required for evidence of uncharged misconduct to be relevant to prove identity. For identity to be established, the uncharged misconduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. [Citation.] '*The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.*' " (*People v. Ewoldt*, *supra*, 7 Cal.4th. at p. 403, italics added.)

Similarly, in *People v. Balcom* (1994) 7 Cal.4th 414, 425, the Supreme Court stated that evidence of uncharged crimes is admissible to prove identity only where "[t]he highly unusual and distinctive nature of both the charged and uncharged offenses *virtually eliminates the possibility* that anyone other than the defendant committed the charged offense." (Italics added.) "[O]nly common marks having some degree of distinctiveness tend to raise an inference of identity and thereby invest other-crimes evidence with probative value." (*People v. Thornton* (1974) 11 Cal.3d 738, 756, disapproved on other grounds in *People v. Flannel* (1979) 25 Cal.3d 668, 684-685, fn. 12.)

The similarities relied on by the trial court in this case do not raise such an inference. Rather they are characteristics "'of such common occurrence that they are shared not only by the charged crime and [the] defendant's prior offense[ ], but also by numerous other crimes committed by persons other than defendant.'" (*People v. Harvey* (1984) 163 Cal.App.3d 90, 101 [use of handguns]; see also *People v. Felix* (1993) 14 Cal.App.4th 997, 1005 ["The fact that both crimes were committed by two men is grossly insufficient as a criminal signature"].) We conclude that the trial court erred by determining that the characteristics of the Boardwalk robberies and the home invasion robberies were sufficiently unusual and distinctive to be admitted in evidence to prove identity. Further, by instructing the jury that it could use evidence of the Boardwalk robberies in determining the issue of identity, as well as intent, the court erred.

The error, however, was harmless. Regarding the issue of identity, there was overwhelming evidence that Washington and Smith were two of the three perpetrators of the home invasion. Washington's and Smith's statements to the police contained numerous admissions concerning their commission of robberies and sex crimes in the condominium. The DNA evidence as to Washington showed he was a possible contributor to the mixture of male DNA from Elizabeth's vaginal swab and could not be excluded as a contributor to Elizabeth's external genital swab. Washington could not be excluded as a contributor to the male DNA mixture from Catherine's external and internal genital swabs. As to Smith, the DNA testing revealed that he could not be excluded as a major contributor to Catherine's vaginal swabs. Also, the sweatshirt recovered from the trash dumpster at a residence associated with Smith had a stain near the bottom that was

positive for semen. Smith and Catherine were major contributors to the DNA mixture from the seminal fluid stain on the sweatshirt. By discarding the sweatshirt, Smith showed a consciousness of guilt. As they left the Mission Beach area, Smith and Washington bragged about the sex crimes. Smith was caught on the surveillance video of a convenience store where he attempted to use Catherine's stolen ATM card. Therefore, to the extent the court erred by instructing the jury it could use the Boardwalk robberies on the identity issue, as well as the intent issue, the error was harmless under either the *Watson* (*People v. Watson* (1956) 46 Cal.2d 818, 836) or *Chapman* (*Chapman v. California* (1967) 386 U.S. 18, 24) tests.

As to Washington's and Smith's claims that the admission of evidence of the Boardwalk robberies violated their due process right to a fundamentally fair trial, we determine whether a permissible inference can be drawn from the evidence. "Only if there are *no* permissible inferences the jury may draw from the evidence can its admission violate due process. Even then, the evidence must 'be of such quality as necessarily prevents a fair trial.'" (*Jammal v. Van de Kamp* (9th Cir. 1991) 926 F.2d 918, 920.) Furthermore, even an incorrect ruling to admit prior "bad acts" evidence under Evidence Code section 1101, subdivision (b) does not violate federal due process rights unless it "'infected the entire trial.'" (*Estelle v. McGuire* (1991) 502 U.S. 62, 72.) We have concluded the court's ruling to allow the Boardwalk robbery evidence on the issue of intent was correct under California law—permissible inferences can be drawn on this issue from the evidence. Accordingly, due process rights are not implicated. This is not the "extraordinary case in which unprotested evidence of past offenses is a dominant part

of the evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose." (*People v. Collie* (1981) 30 Cal.3d 43, 64.)

To the extent the court erred by instructing the jury it could use the Boardwalk robbery evidence on the issue of intent and/or identity on due process grounds, the instructional error was harmless beyond a reasonable doubt.

### *C. Flight Instruction*

Washington contends the court prejudicially erred by instructing the jury pursuant to the standard flight instruction (CALCRIM No. 372) as follows:

"If a defendant fled immediately after the crime was committed or after he was accused of committing the crime, that conduct may show that he was aware of his guilt. If you conclude the defendant fled, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled cannot prove guilt by itself."

Washington, who traveled to Arizona after the home invasion, argues the evidence was insufficient to support the instruction. We disagree.

"'An instruction on flight is properly given if the jury could reasonably infer that the defendant's flight reflected consciousness of guilt, and flight requires neither the physical act of running nor the reaching of a far-away haven. [Citation.] Flight manifestly does require, however, a purpose to avoid being observed or arrested.'" (*People v. Visciotti* (1992) 2 Cal.4th 1, 60; *People v. Bradford* (1997) 14 Cal.4th 1005, 1055; *People v. Turner* (1990) 50 Cal.3d 668, 694-695 [to obtain instruction, the prosecution need not prove the defendant in fact fled, i.e., departed the scene to avoid arrest, only that a jury could find the defendant fled and permissibly infer a consciousness of guilt from the evidence].)

In *People v. Carter* (2005) 36 Cal.4th 1114, 1182, our Supreme Court held the flight instruction was proper when the defendant left California for Las Vegas a few days after his crime. (See also *People v. Smithey* (1999) 20 Cal.4th 936, 982 [flight instruction proper where "defendant drove to another town instead of summoning help"]; *People v. Bradford, supra*, 14 Cal.4th at p. 1055 [flight instruction proper where defendant left the apartment where he killed the victim, went to another apartment, packed his belongings and asked for a ride out of town].) In view of the evidence introduced that Washington left California in the days immediately following the charged offenses, the flight instruction plainly was proper because a jury reasonably could infer that his flight reflected consciousness of guilt. Washington claims there was no evidence that when he left California he was aware of criminal charges against him. However, the instruction does not require knowledge on a defendant's part that criminal charges have been filed. (*People v. Carter, supra*, 36 Cal.4th at p. 1182.) Further, it does not matter that Washington turned himself in to law enforcement authorities in Arizona without resistance. The instruction does not require resistance upon arrest. (*Ibid.*) As noted, the flight instruction merely permitted the jury to consider evidence of flight in deciding the defendants' guilt or innocence; it did not suggest that the jury should consider such evidence as dispositive.

Also, upon leaving the condominium and observing the police questioning Diego and Armando at the benches, Washington and Smith abandoned their plan to commandeer Elizabeth and Catherine to an ATM. Either Washington or Smith said "5-0 in the park." They immediately let the women go, grabbed a bag full of stolen property

and ran away from the park. These facts, from which a jury reasonably could have inferred "a purpose to avoid being observed or arrested" (*People v. Visciotti, supra*, 2 Cal.4th at p. 60) also supported the flight instruction. To the extent Smith joins in codefendants' arguments that inure to his benefit, he cannot prevail on the flight instruction issue.<sup>7</sup>

To the extent that Washington contends the flight instruction violated his right to due process because it creates an unconstitutional permissive inference (see *Ulster County Court v. Allen* (1979) 442 U.S. 140, 166, fn. 28), our Supreme Court has rejected the contention. (*People v. Mendoza* (200) 24 Cal.4th 130, 179-181.) Under the principles of stare decisis, we are bound by the Supreme Court's ruling and accordingly reject Washington's due process challenge to the flight instruction. (*Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450, 455.)

#### D. Cruel and/or Unusual Punishment

Washington contends his sentence—consisting of a determinate term of 15 years and four months, consecutive to two indeterminate life terms, consecutive to an indeterminate term of 300 years to life—constitutes cruel and/or unusual punishment under the United States and California Constitutions.<sup>8</sup> Washington notes that because of the provisions of the "One-Strike" law, he will not be eligible for parole for 330 years,

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<sup>7</sup> In part III. B., *post*, we discuss the propriety of the flight instruction as to Watkins.

<sup>8</sup> Smith, who received an identical sentence, and Watkins, who received the same sentence except for the two consecutive life sentences for kidnapping, join Washington's contention. In discussing this contention, we address whether all three defendants' sentences constitute cruel and/or unusual punishment.

which effectively means he has been sentenced to a term of life in prison without the possibility of parole. Washington does not directly challenge the general facial constitutionality of the "One Strike" statutory scheme, but rather asserts its application in this case to him is unconstitutional.<sup>9</sup>

Washington must overcome a "considerable burden" in challenging his penalty as cruel and/or unusual. (*People v. Wingo* (1975) 14 Cal.3d 169, 174.) A sentence may violate the prohibition against cruel or usual punishment only if it is so disproportionate to the crime for which it was imposed that it "shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424 (*Lynch*).) Successful challenges to proportionality are an "exquisite rarity." (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196.)

With respect to the prohibition against cruel or unusual punishment contained in California Constitution, article I, section 17, Washington relies on *Lynch, supra*, 8 Cal.3d 410 and *People v. Dillon* (1983) 34 Cal.3d 441 (*Dillon*) to claim his 300-year-to-life prison term for his sex offenses, is "'grossly disproportionate.'" In *Lynch*, our

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<sup>9</sup> Facial challenges to the "One Strike" law have not succeeded. (See *People v. Alvarado* (2001) 87 Cal.App.4th 178, 200-201 and *People v. Estrada* (1997) 57 Cal.App.4th 1270, 1280 [holding "One Strike" law does not indiscriminately mete out the same punishment to a broadly defined class of offenses but singles out crimes involving sexual violence and expresses the Legislature's "zero tolerance" toward commission of these crimes].) The 25-years-to-life sentences under section 667.61 apply only to specific sex offenses. (§ 667.61, subd. (c).) Further, 25-years-to-life sentences do not apply to all of those specified offenses, such as forcible rape, but only if aggravating circumstances such as commission of the offense during a burglary or kidnapping are present. (§ 667.61, subds. (a), (c), (d), (e).) The statute's structure and provisions therefore recognize gradations of culpability.

Supreme court applied a three-pronged approach to determine whether a particular punishment is disproportionate to the offense for which it is imposed. (*Lynch, supra*, 8 Cal.3d at pp. 429-438.) Under the first prong, the court examined the "nature of the offense and/or the offender, with particular regard to the degree of danger both present to society." (*Id.* at p. 425.) Second, the court compared the challenged punishment with that prescribed for more serious crimes in the same jurisdiction. (*Id.* at p. 426.) Finally, the challenged punishment was compared with punishments for the same offense in other jurisdictions. (*Id.* at p. 427.) After its analysis, the court there held an indeterminate sentence of one year to life for recidivists who commit indecent exposure under section 314 was void as cruel or unusual punishment. (*Lynch, supra*, at p. 439.) In *Dillon*, the California Supreme Court reaffirmed *Lynch* and concluded that under the facts of that case, the life imprisonment of a 17-year-old defendant for first degree murder based on a felony-murder theory violated California's constitutional prohibition against cruel or unusual punishment. (*Dillon, supra*, 34 Cal.3d at pp. 450-452, 477, 482-483, 489.) The court in so deciding refined the first *Lynch* prong, stating trial and reviewing courts should examine "not only the offense in the abstract," but also "'the facts of the crime in question.'" (*Id.* at p. 479.) Courts should consider "the totality of the circumstances" including motive, the way the crime was committed, the extent of the defendant's involvement, and the consequences of the defendant's acts. (*Ibid.*) With respect to the nature of the offender, a court should ask whether "the punishment is grossly disproportionate to the defendant's individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind." (*Ibid.*)

Under the first *Lynch* prong, we observe Washington, Smith and Watkins feloniously entered the residence of a college student at night ostensibly to steal from or rob the inhabitants. Not only did they proceed to rob the resident and his three student guests at gun point, but Washington, Smith and Watkins went on to repeatedly rape the two women and force them to engage in multiple acts of oral copulation. The litany of defendants' sex crimes also included sodomy, rape by a foreign object, attempting to force Adam to have intercourse with Elizabeth and then forcing her to orally copulate him before again attempting to force the two of them to have intercourse. These offenses went beyond mere sexual gratification; they terrified the victims, humiliated and degraded them and placed them at grave danger. Defendants committed "precisely the sort of sexual offense[s] that warrant[] harsh punishment." (*People v. Alvarado, supra*, 87 Cal.App.4th at p.178.)

Nothing in the background of Washington, Smith or Watkins suggests that any of them did not appreciate the wrongfulness of his conduct.<sup>10</sup> Defendants' backgrounds also do not militate against the seriousness and dangerousness of their offenses and do not reduce their culpability. Defendants' crimes on October 15, 2006, demonstrate the extreme danger they pose and their predatory nature. Because the "One Strike" law targets people such as Washington, Smith and Watkins who commit substantial sexual

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<sup>10</sup> Washington's background is discussed in part I, *ante*. Additionally, his probation report shows Washington, who was 18 at the time of these crimes, had two juvenile adjudications for first degree burglary. Smith is one year older than Washington, and did not have any criminal history. Watkins is 12 years older than Washington; his criminal history consisted of a misdemeanor conviction of unlawful fight in a public place.

crimes against more than one victim, we cannot say its application in this case is disproportional to their crimes under the first analytical tool of *Lynch*, or that its application shocks the conscience and offends fundamental notions of human dignity.

As to the second *Lynch* analytical prong, Washington compares his forcible sex crimes with other more serious crimes in California, arguing the commission of such sexual offenses is not as serious as a "cold-blooded premeditated murder with a firearm" (§§ 190, subd. (a), 12022.53, subd. (d)), which carries a maximum sentence of 50 years to life and parole eligibility after 50 years. However, this comparison is inapposite because it is the commission of substantial multiple sex crimes against multiple victims that places Washington, Smith and Watkins under the "One Strike" law. It is illogical to compare their punishment for multiple sex offenses perpetrated against more than one victim to the punishment of others who have committed more serious crimes, but are not qualified sex offenders under the "One Strike" law. To be subjected to section 667.61, Washington, Smith and Watkins had to have been found to have committed their forcible sex crimes against multiple victims during the commission of a burglary. "[T]he gravity of the two crimes committed by [the] defendant (burglary and rape) is greater than the sum of their parts: being raped in her own home is a woman's worst nightmare." (*People v. Crooks* (1997) 55 Cal.App.4th 797, 807; *People v. Alvarado*, *supra*, 87 Cal.App.4th at p. 200 ["the double trauma of having one's home invaded and then being sexually violated is substantial"].)

Moreover, California does not reserve a sentence of life without the possibility of parole to offenses that involve that taking of human life. For example, aggravated

kidnapping or train wrecking (§§ 209, subd. (a), 218) impose life without the possibility of parole sentences. "Such sentences have been found not to constitute cruel or unusual punishment because the Legislature could reasonably decide that crimes which involve an inherent danger to the life of the victim are particularly heinous even if no death occurs." (*People v. Crooks*, *supra*, 55 Cal.App.4th at p. 808.)

We also note that California has long permitted the imposition of full, consecutive sentences for forcible sex crimes, even if they are committed on a single occasion against a single victim. (§ 667.6, subds.(c), (d).) Under that statute, violent sex offenders have been sentenced to lengthy prison terms equivalent to life without the possibility of parole, and these sentences have been found not to constitute cruel or unusual punishment. (See, e.g., *People v. Huber* (1986) 181 Cal.App.3d 601, 633-635; *People v. Bestelmeyer* (1985) 166 Cal.App.3d 520, 531-532.)

The power to define crimes and prescribe punishment in California is a legislative function and we may interfere in this process only if a statute or statutory scheme prescribes a penalty so severe in relation to the crime or crimes to which it applies as to violate the constitutional prohibition against cruel or unusual punishment. (*Dillon*, *supra*, 34 Cal.3d at pp. 477-478.) The purpose of the "One Strike" law is "to ensure serious and dangerous sex offenders would receive lengthy prison sentences upon their first conviction[,] . . . where the nature or method of the sex offense 'place[d] the victim in a position of *elevated vulnerability*.'" (*People v. Palmore* (2000) 79 Cal.App.4th 1290, 1296.) In enacting the "One Strike" law, the Legislature chose to punish sexual offenders such as Washington, Smith and Watkins who were convicted of multiple forcible sex

offenses against multiple victims with a 25-years-to-life term for each offense. (§ 667.61, subds.(a), (c), (d).) Subdivision (i) of section 667.61 provides "the court shall impose a consecutive sentence for each offense that results in a conviction under this section if the crimes involve separate victims or involve the same victim on separate occasions. . . ." In making multiple convictions for certain sex offenses punishable by multiple life terms, the Legislature has essentially expressed the view that such offenses deserve more severe punishment than a single sex offense because of the predatory nature of the offender who strikes against multiple victims on single or numerous occasions. (*People v. Murphy* (1998) 65 Cal.App.4th 35, 41; *People v. DeSimone* (1998) 62 Cal.App.4th 693, 698.) The sentences prescribed under the "One Strike" law reflect the Legislature's conclusion that aggravating circumstances specified in section 667.61 place the victim in a position of heightened vulnerability and warrant lengthy prison sentences to protect society from serious and dangerous sex offenders. (*People v. Alvarado, supra*, 87 Cal.App.4th at p. 197.) In light of these legislative findings and the seriousness of the offense, courts have concluded they could not "say that punishing such conduct as severely as . . . murder is either shocking or outrageous." (*Id.* at p. 200; *People v. Estrada, supra*, 57 Cal.App.4th at pp. 1278-1282.) That the Legislature saw it necessary to enact this statute and sentencing scheme to impose harsher punishment for offenders such as Washington, Smith and Watkins does not shock our conscience.

As to the third *Lynch* prong, Washington makes no showing regarding punishment for similar offenses in other jurisdictions and thus cannot meet his burden to show cruel or unusual punishment.

Washington has not shown his sentence violates the Eighth Amendment to the United States Constitution, which "prohibits imposition of a sentence that is grossly disproportionate to the severity of the crime." (*Rummel v. Estelle* (1980) 445 U.S. 263, 271.) Because the federal proportionality analysis closely resembles California's *Lynch* analytical framework (*Solem v. Helm* (1983) 463 U.S. 277, 291-292) and offers no greater protections than that provided by the California constitutional provision (see *People v. Martinez* (1999) 71 Cal.App.4th 1502, 1510), a punishment that satisfies the California standard, as here, also necessarily satisfies the federal standard. (See *People v. Anderson* (1972) 6 Cal.3d 628, superseded on another point by constitutional amendment as stated in *People v. Hill* (1992) 3 Cal.4th 959, 1015.) Washington has not shown or provided any persuasive authority to support his claim this is one of those rare cases in which a sentence is so grossly disproportionate to the gravity of the offense that it violates the federal constitutional proscription against cruel and unusual punishment.

We conclude that sentences of Washington, Smith and Watkins do not constitute cruel and/or unusual punishment under either the California or United States Constitutions.

## II. *Smith's Appeal*

### A. *Evidence of Prior Bad Acts*<sup>11</sup>

#### B. *Sufficiency of Evidence Smith Aided and Abetted First Rape of Catherine*

Pointing out that he was not in the bedroom when Catherine was initially raped, Smith contends his conviction in connection with that rape under the prosecution's aiding and abetting theory is not supported by substantial evidence that he knew of Watkins's and Washington's unlawful purpose to sexually assault her until after sex crimes in that bedroom were completed. We agree.

We assess the sufficiency of the evidence by reviewing "'the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.'" (*People v. Steele* (2002) 27 Cal.4th 1230, 1249.) We presume in support of the judgment the existence of every fact that could reasonably be deduced from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) We may reverse for lack of substantial evidence only if "'upon no hypothesis whatever is there sufficient substantial evidence to support'" the conviction. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

""All persons concerned in the commission of a crime, . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, . . . are principals in any crime so committed." [Citation.]" (*People v. Leon* (2008) 161

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<sup>11</sup> See discussion in part I. B., *ante*.

Cal.App.4th 149, 157.) Accordingly, an aider and abettor "" shares the guilt of the actual perpetrator."" (*Ibid.*) There are two types of aider and abettor liability: (1) an aider and abettor with the necessary mental state is guilty of the intended crime; and (2) an aider and abettor is guilty not only of the intended crime, but of any other offense that was a natural and probable consequence of the crime aided and abetted. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117; see also § 31.) The jury here was instructed on only the first type of aider and abettor liability pursuant to CALCRIM Nos. 400 and 401.<sup>12</sup>

In general, neither presence at the scene of the crime, nor knowledge of but failure to prevent commission of the crime is sufficient to establish liability as an aider and

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<sup>12</sup> The jury was instructed pursuant CALCRIM No. 400 as follows: "A person may be guilty of a crime in two ways. One, he may have directly committed the crime. I will call that person the perpetrator. Two, he or she may have aided and abetted a perpetrator, who directly committed the crime. A person is equally guilty of the crime whether he committed it personally or aided and abetted the perpetrator who committed it. [¶] Under some specific circumstances, if the evidence established aiding and abetting of one crime, a person may also be guilty of other crimes that occurred during the commission of the first crime."

The jury was instructed pursuant to CALCRIM No. 401 as follows: "To prove that a defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that: [¶] 1. The perpetrator committed the crime; [¶] 2. The defendant knew that the perpetrator intended to commit the crime; [¶] 3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; [¶] AND [¶] 4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime. [¶] Someone *aids and abets* a crime if he knows of the perpetrator's unlawful purpose and he specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime. [¶] If all of these requirements are proved, the defendant does not need to actually have been present when the crime was committed to be guilty as an aider and abettor. [¶] If you conclude that a defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. [¶] However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him an aider and abettor. . . ."

abettor. (See *People v. Durham* (1969) 70 Cal.2d 171, 181; *In re Jose T.* (1991) 230 Cal.App.3d 1455, 1460.) Under the traditional doctrine of aider and abettor liability,

"[t]o be guilty of a crime as an aider and abettor, a person must 'aid [ ] the [direct] perpetrator by acts or encourage[ ] him [or her] by words or gestures.' In addition, . . . [citations] . . . the person must give such aid or encouragement 'with knowledge of the criminal purpose of the [direct] perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of,' the crime in question. [Citations.] When the crime at issue requires a specific intent, in order to be guilty as an aider and abettor the person 'must share the specific intent of the [direct] perpetrator,' that is to say, the person must 'know[ ] the full extent of the [direct] perpetrator's criminal purpose and [must] give[ ] aid or encouragement with the intent or purpose of facilitating the [direct] perpetrator's commission of the crime.' " (*People v. Lee* (2003) 31 Cal.4th 613, 623-624. brackets in original.)

Although the actual perpetrator and aider and abettor equally share the guilt, they do not share a common mental state. (*People v. Leon, supra*, 161 Cal.App.4th at p. 158.) The actual perpetrator must have whatever mental state is required for the crime charged. (*Ibid.*) An aider and abettor must act with knowledge of the criminal purpose of the perpetrator and with the intent to commit the intended crime or to assist in the commission of the crime. (*Ibid.*)

Here, the record does not support a finding that Smith knew of and shared Watkins's and Washington's specific intent when Catherine was raped the first time. According to the prosecution's theory of the case and as argued to the jury, the initial purpose of the home invasion was robbery if people were present or theft if no one was there. Watkins and Washington, who were the first two to enter the condominium, went upstairs after they realized there were more victims to rob besides Jack and Elizabeth. Upon finding Catherine and Adams in their underwear, Watkins and Washington robbed

these two students and then forcibly committed sex offenses against Catherine. This occurred in the bedroom of Jack's roommate, who was not present. There was no evidence that Smith was in the roommate's bedroom; the victims' testimony placed the intruder resembling Smith in only Jack's bedroom. What the evidence showed was that Smith, who had entered the condominium after Watkins and Washington, was downstairs at the time of Catherine's initial rape. After the initial intruders (Watkins and Washington) went upstairs, Elizabeth testified she heard someone rummaging downstairs. The only reasonable inference to draw on this record is the person rummaging was Smith. There is no evidence, nor can a reasonable inference be drawn, that Smith knew at that point—that is, before he went upstairs—that the unlawful purpose of the home invasion had been enlarged to include forcible sex crimes.

The Attorney General concedes that Smith did not participate in the initial rape of Catherine. Nonetheless, the Attorney General argues that the jury reasonably could have concluded that Smith observed the initial rape of Catherine before he moved to the other bedroom and therefore was aware that the unlawful purpose of the home invasion had been expanded to include sex crimes. The only support offered by the Attorney General to support this theory is that the jury could have found Smith's statements to the police untrustworthy. That is not enough. Aider and abettor liability cannot rest on speculation. Regardless of how the jury viewed Smith's statements to the police, there was no substantial evidence that placed Smith upstairs as an observer of Catherine's initial rape.

If a person in fact aids, promotes, encourages or instigates the commission of a crime, the requisite intent to render such aid must be formed prior to or during the

"commission" of that offense. (*People v. Beeman* (1984) 35 Cal.3d 547, 558.) "It is legally and logically impossible to both form the requisite intent and in fact aid, promote, encourage, or facilitate commission of a crime after the commission of that crime has ended." (*People v. Cooper* (1991) 53 Cal.3d 1158, 1164.) By the time Smith went upstairs, the initial rape of Catherine was over. It was not until then that Smith (1) obtained knowledge of the expanded unlawful purpose of the home invasion and (2) formed the requisite intent to participate in and/or aid and abet forcible sex crimes against the two women. Smith's conviction for count 2 must be reversed for insufficient evidence.

The Attorney General also argues that when Watkins, Washington and Smith entered the condominium they "evidenced an 'anything goes' mentality," which encompassed committing sex offenses as well stealing property. We are not persuaded. To the extent the Attorney General is suggesting that other violent crimes are a natural and probable consequence of a home invasion by armed perpetrators, he cannot prevail here because the jury was not instructed under the aiding and abetting doctrine of natural and probable consequences.

### III. *Watkins's Appeal*

#### A. *Prosecutorial Misconduct*

Watkins contends the prosecutor committed prejudicial misconduct during his closing argument by stating there was no "legitimate issue" as to defendants' guilt.

Watkins argues the prosecutor's remarks improperly shifted the burden of proof to him to prove his innocence.<sup>13</sup>

Toward the end of his argument, the prosecutor commented that there must be a "legitimate issue" in a case and suggested defendants' only defense must be identity because the victims did not identify them. The prosecutor noted the identity issue had been resolved by other evidence that pointed to the defendants. The prosecutor continued:

"And just because someone elects to have a jury trial in this particular country—the system doesn't make you plead guilty. You have the constitutional right to have a jury trial. But that doesn't mean there's any legitimate issue as to guilt.

"In this case, ladies and gentlemen, I submit to you this case of guilt is overwhelming and compelling. And the fact that we are now . . . in the end of a jury trial doesn't change that fact. This is simply an exercise in the defendant[]s[] constitutional rights to which they are entitled."

We disagree that the prosecutor shifted the burden of proof. As set forth on the next page of the reporter's transcript, the prosecutor remarked: "The People have proved their burden beyond a reasonable doubt." There was no suggestion in the prosecutor's comment that Watkins "bore a burden to establish his lack of guilt, and there is no reasonable likelihood that the jury would have understood" the remark in this fashion.

(*People v. Osband* (1996) 13 Cal.4th 622, 697.) Rather than a shift in the burden of proof or a debunking of the presumption of innocence, the prosecutor's comment is, in our

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<sup>13</sup> We deem this discussion to apply to Smith and Washington as well as Watkins. Smith and Washington, who have joined in their codefendants' arguments to the extent they inure to their benefit, made sufficient objections below to preserve the issue for appeal.

view, properly read as an observation on the state of the evidence and was proper argument. (*People v. Cook* (2006) 39 Cal.4th 566, 608.) "A prosecutor may make fair comment on the state of the evidence." (*Ibid.*) The prosecutor's remarks did not constitute misconduct.

In any event, a prosecutor's misconduct violates the federal Constitution when it is ""so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."" (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214.) Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. (*People v. Ochoa* (1998) 19 Cal.4th 353, 427.) Finally, "when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

Here, the prosecutor's brief reference to "legitimate issue" did not constitute an egregious pattern of misconduct and did not infect the trial with unfairness (*People v. Gionis, supra*, 9 Cal.4th at p. 1214), particularly since both the prosecutor and the trial court told the jury that the prosecution had the burden of proving the defendant guilty. In addition, the trial court instructed the jury that it must follow the law stated in the jury instructions, and if arguments made by counsel conflicted with the jury instructions, the jury was required to follow the court's instructions. (CALCRIM No. 200.) (*People v. Sisneros* (2009) 174 Cal.App.4th 142, 152-153.)

The prosecutor's statements made during closing argument do not constitute misconduct requiring reversal.

### B. *Flight Instruction*

Watkins contends there was no substantial evidence to support the jury instruction on flight as to him. (See discussion in Part I. C., *ante*.) We agree, and further note the jurors were instructed that all instructions applied to all defendants unless the court instructed them otherwise. (CALCRIM No. 203.)

However, the error did not result in prejudice. An error in giving a flight instruction is harmless unless it is reasonably probable the result would have been more favorable to defendant if the instruction had not been given. (See *People v. Guiton* (1993) 4 Cal.4th 1116, 1129-1130; *People v. Wright* (1988) 45 Cal.3d 1126, 1144.) CALCRIM No. 372 does not tell the jury there was evidence of flight. It leaves this determination to the jury. "The instruction did not assume that flight was established, but instead permitted the jury to make that factual determination and to decide what weight to accord it." (*People v. Carter, supra*, 36 Cal.4th at pp. 1182-1183, fn. omitted.) If there was insufficient evidence of flight as to Watkins, we may safely assume that the jury made no use of the instruction with respect to him. (*People v. Visciotti, supra*, 2 Cal.4th at p. 61 ["the instruction did not assume flight was established, leaving the factual determination and significance to the jury"].) Furthermore, the evidence that Watkins committed the instant crimes—his DNA, his admission that he "made that bitch kiss [my] dick"—was overwhelming. In light of this evidence, we conclude the jury would have

reached the same conclusion had the flight instruction not been given as to him. (*People v. Turner, supra*, 50 Cal.3d at p. 695.)

#### DISPOSITION

Smith's conviction on count 2 is reversed. The trial court is directed to amend the abstract of judgment accordingly, and forward a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment as to Smith is affirmed.

The judgment as to Washington is affirmed in its entirety.

The judgment as to Watkins is affirmed in its entirety.

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HALLER, J.

WE CONCUR:

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McCONNELL, P. J.

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AARON, J.